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No. 99-391

Supreme Court, U.S.
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In the Supreme Court of the United States

ROBIN FREE and RENEE FREE
Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY and MEAD-JOHNSON & COMPANY
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

Cases:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 4

Andrews v. American Tel. & Tel. Co., 95 F.3d 1014 (11th Cir. 1996) 4, 5

Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997) 5

Arnold v. State Farm Mut. Auto. Ins. Co., No. 99-L-0896 (St. Clair County, filed Oct. 22, 1999) 17

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 3

Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999) 3

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 4

Capone v General Motors Corp., No. 99-L-1127 (Madison County, filed Nov. 17, 1999) 17

Carpenter v. BMW of N. Am., Inc., 1999 WL 415390 (E.D. Pa. June 21, 1999) 4, 5

Casper v. Cunard Line, Ltd., 560 F. Supp. 240 (E.D. Pa. 1983) 5, 6

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 3, 4, 5

Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998) 4, 5

Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998) 5

TABLE OF AUTHORITIES — Continued

Page(s)

Coco v. State Farm Mut. Auto. Ins. Co., No. 99-L-394A (St. Clair County, filed April 28, 1999) 16

Crockett v. Michigan Bulb Co., No. 98-L-1054 (St. Clair County, filed Dec. 11, 1998) 16

Crockett v. Seta Corp., No. 98-L-1055 (St. Clair County, filed Dec. 11, 1998) 16

Crockett v. Time, Inc., No. 98-L-1056B (St. Clair County, filed Dec. 11, 1998) 16

Crockett v. United States Purchasing Exch., No. 98-L-1057 (St. Clair County, filed Dec. 11, 1998) 16

Elster v. Alexander, 76 F.R.D. 440 (N.D. Ga. 1977) 6

Ex parte Ford Motor Credit Co., 697 So. 2d 464 (Ala. 1997) 10

Ex parte Masonite Corp., 681 So. 2d 1068 (Ala. 1996) 8

Ford Motor Co. v. Sheldon, 965 S.W.2d 65 (Tex. App.-Austin), review granted Dec. 23, 1998 11

Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) . . 4, 5

Hobbs v. State Farm Mut. Auto. Ins. Co., No. 99-L-1068 (Madison County, filed Nov. 2, 1999) 17

In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) 4, 5

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) . 5

TABLE OF AUTHORITIES — Continued

Page(s)

In re Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214 (E.D. La. 1998) 4, 5-6, 11

In re Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974) 4

In re Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217 (W.D. Mich. 1998) . 4, 5, 12

In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417 (E.D. La. 1997) 5, 6, 9

In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) 4

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 3, 5

In re: The Hartford Sales Practices Litig., 1999 U.S. Dist. LEXIS 10402 (D. Minn. June 10, 1999) 12

International Paper Co. v. Naef, No. A-28 (filed July 3, 1997) 10

Kelley v. Mid-America Racing Stables, Inc., 139 F.R.D. 405 (W.D. Okla. 1990) 5

Kent v. SunAmerica Life Ins. Co., 2000 WL 15015 (D. Mass. Jan. 3, 2000) 12

Klinefelter Family Revocable Living Trust v. First Life Assurance Co., No. C-6930-96-G (Hidalgo County Dist. Ct. Mar. 30, 1999) 12

Littleton v. Shelter Ins. Co., 99-L-864 (Madison County, filed Sept. 7, 1999) 16

TABLE OF AUTHORITIES — Continued

Page(s)

Longstreet v. State Farm Mut. Auto. Ins. Co., No. 98-MR77 (Madison County, filed Feb. 27, 1998) 16

Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987), mandamus granted, 855 F.2d 1062 (3d Cir. 1988) 5

Mack v. General Motors Acceptance Corp., 169 F.R.D. 671 (M.D. Ala. 1996) 5, 6, 10

Marascalco v. International Computerized Orkeratology Soc'y, Inc., 181 F.R.D. 331 (N.D. Miss. 1998) 4-5, 6

McHan v. Grandbouche, 99 F.R.D. 260 (D. Kan. 1983) 5, 6

Moorhead v. State Farm Mut. Auto. Ins. Co., No. 95-AR-0668-5 (N.D. Ala. Sept. 12, 1997) . . . 13

Murray v. State Farm Mut. Auto. Ins. Co., No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997) 13

Naef v. Masonite Corp., No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995) (Ala. 1996) 8, 9

Nagel v. Archer Daniels Midland Co., No. 99-L-801 (Madison County, filed Aug. 6, 1999) 16

Parkhill v. Minnesota Mut. Life Ins. Co., 188 F.R.D. 332 (D. Minn. 1999) 12

Paul v. Country Mut. Ins. Co., No. 99-L-995 (Madison County, filed Oct. 13, 1999) 16

Peoples v. American Fidelity Life Ins. Co., 176 F.R.D. 637 (N.D. Fla. 1998) 12

TABLE OF AUTHORITIES — Continued

Page(s)

Phillips v. Ford Motor Co., No. 99-L-1041 (Madison County, filed Oct. 26, 1999) 17

Poe v. Sears, Roebuck & Co., 1998 WL 113561 (N.D. Ga. Feb. 13, 1998) 5, 6

Reichmann v. Archer Daniels Midland Co., No. 99-L-800 (Madison County, filed Aug. 6, 1999) 16

Rios v. Allstate Ins. Co., No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998) 13

Rios v. St. Paul Fire & Marine Ins. Co., No. 99-L-1125 (Madison County, filed Nov. 16, 1999) 17

Ritter, Laber & Assocs. v. Koch Oil, Inc., 2000 N.D. LEXIS 14 (N.D. Jan. 21, 2000) 13

Schwartz v. Upper Deck Co., 183 F.R.D. 672 (S.D. Cal. 1999) 4, 5

Security Life of Denver Ins. Co. v. Ferguson, 1999 WL 339017 (Tex. App.–Dallas May 28, 1999) 12

Shemwell v. The Farmers Ins. Group of Cos., No. 99-L-865 (Madison County, filed Sept. 11, 1999) 16

Siler v. State Farm Mut. Ins. Co., No. 99-L-863 (Madison County, filed Nov. 30, 1999) 17

Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880 (5th Cir. 1973) 4

Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir.), cert. denied, 118 S. Ct. 2312 (1998) 4

TABLE OF AUTHORITIES — Continued

Page(s)

State Farm Mut. Auto. Ins. Co. v. Speroni, No. 97-2063 (filed June 22, 1998) 14

Stone v. SBU, Inc., No. 99-L-977 (Madison County, filed Oct. 7, 1999) 16-17

Strasen v. Allstate Ins. Co., No. 99-L-1040 (Madison County, filed Oct. 26, 1999) 17

Texas Farmers Insurance Co. v. Sendejo, No. 95-08-09165-CV (365th Jud. Dist. Ct.) 10

Turner v. Vistakon, Inc., No. 99-L-669 (Madison County, filed June 6, 1999) 16

Velasquez v. Crown Life Ins. Co., 1999 U.S. Dist. LEXIS 13186 (S.D. Tex. Aug. 10, 1999) 12

Vollmer v. Publishers Clearing House, No. 98-L-100B (St. Clair County, filed Feb. 3, 1998) 16

Western Elec. Co. v. Stern, 544 F.2d 1196 (3d Cir. 1976) 5

Winn v. Associates First Capital Corp., No. 99-L-1227 (Madison County, filed Dec. 23, 1999) 17

Zandman v. Joseph, 102 F.R.D. 924 (N.D. Ind. 1984) 6

Statutes and Rules

28 U.S.C. § 1332 . . . . . 1, 2, 17

28 U.S.C. § 1367 . . . . . 2, 17

28 U.S.C. § 1367(b) 17

Colo. Rev. Stat. Ann. § 42-9-107 15

TABLE OF AUTHORITIES — Continued

Page(s)

Ind. Code § 27-4-1.5-8 15

N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(5)(ii) 15

Or. Rev. Stat. § 746.287(1) 15

Or. Rev. Stat. § 746.292(4)(b) 15

R.I. Gen. Laws 1956 § 27-10.2-2 15

W. Va. Code § 46A-6B-3 15

Fed. R. Civ. P. 23 17

Miscellaneous

Auto Insurance: Class-Action Settlement Was a Travesty, DALLAS MORNING NEWS, Dec. 26, 1996, at 28A 11

Class Action Litigation–A Federalist Society Survey, 1 CLASS ACTION WATCH 8

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998), http://www.house.gov/judiciary/41155.htm 7, 17

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) 4

Max Boot, *Rule of Law: A Texas-Sized Class Action Fraud*, WALL ST. J., May 22, 1996, at A23 11

Review & Outlook: Taken for a Ride, WALL ST. J., Oct. 23, 1996, at A22 11

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, WALL ST. J., Oct. 10, 1996, at B1 . 7

TABLE OF AUTHORITIES — Continued

Page(s)

Statement of Dr. John B. Hendricks before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (Mar. 5, 1998) (available at 1998 WL 122544) 7-8

Stateside Associates, *Lawsuits in State Courts: A Case Study in Alabama* (1998) 7

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Chemical Manufacturers Association ("CMA") is a non-profit trade association whose member companies produce, market, and use industrial chemicals. CMA's members comprise more than 90% of the productive capacity for basic industrial chemicals in the United States.

Amici's members have been subjected to abusive class actions in state courts on a regular basis. They accordingly have a strong interest in supporting Congress's decision to confer federal jurisdiction over the claims of absent class members when the named plaintiffs satisfy the amount in controversy and diversity requirements of 28 U.S.C. § 1332.[1]

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Section 1367 unambiguously authorizes the federal courts to exercise supplemental jurisdiction over the claims of absent class members, so long as the courts have original jurisdiction over the claims of the named plaintiffs. The only way for petitioners to escape from the plain language of the statute is to claim that Congress could not possibly have meant what it said. But that claim is hollow. Given the markedly unfair treatment that out-of-state defendants often suffer at the hands of state courts, and the dramatic stakes of modern-day class actions, it was perfectly rational for Congress to broaden federal jurisdiction over class actions by eliminating the requirement that absent class members satisfy the amount in controversy threshold contained in 28 U.S.C. § 1332.

ARGUMENT

As the Fifth and Seventh Circuits have held, and as respondents persuasively show in their brief, 28 U.S.C. § 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members so long as the courts have original jurisdiction over the claims of the named plaintiffs. In the diversity context, this means that, if the named plaintiffs do not hail from the same state as any of the defendants and if the value of the claims of the named plaintiffs exceeds the monetary threshold established in 28 U.S.C. § 1332, the federal courts have jurisdiction over the claims of the absent class members without regard to the value of those claims. Because respondents' brief demonstrates the statute's crystal clarity and clears away the fog created by petitioners' brief, amici will not here burden the Court with an additional analysis of the plain language of the statute. Instead, we will demonstrate that broadening federal jurisdiction over class actions was a perfectly rational thing for Congress to do and hence debunk petitioners' suggestion that Congress could not have meant to have done it.

1. The original purpose of diversity jurisdiction was to protect out-of-state parties from being treated unfairly by local courts. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.). With the advent of the class action, the need for such protection has multiplied. As Judge Easterbrook recently explained:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). The Fifth Circuit has similarly noted:

> [C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted). Accord *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (explaining that, once cases are certified as class actions, defendants confront "intense pressure to settle" rather than "roll the[] dice" on a trial and risk

bankruptcy). See also HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (terming phenomenon "blackmail settlements").

2. The federal courts have recognized that, in order to prevent the class action device from being used as a weapon of extortion, it is necessary to apply the requirements of Rule 23 rigorously. See, *e.g.*, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *Castano*, 84 F.3d at 740. In particular, the federal appellate courts have uniformly refused to permit class actions when the claims of the class members would require individualized proof and the defendant would have individualized defenses to those claims. See, *e.g.*, *Broussard*, 155 F.3d at 340-344; *Sprague v. General Motors Corp.*, 133 F.3d 388, 397-399 (6th Cir.) (en banc), cert. denied, 118 S. Ct. 2312 (1998); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023-1025 (11th Cir. 1996); *Castano*, 84 F.3d at 744-745; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626-630 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1084-1085 (6th Cir. 1996); *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854-856 (9th Cir. 1982); *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-883 (5th Cir. 1973).[2] Indeed, several federal courts have recognized that

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[2] The federal district court decisions refusing to certify classes on this ground are too numerous to list. A representative sample includes: *Carpenter v. BMW of N. Am., Inc.*, 1999 WL 415390, at *3-*4 (E.D. Pa. June 21, 1999); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 676-680 (S.D. Cal. 1999); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 220-222 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455-457 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220-222 (E.D. La. 1998); *Marascalco v. International Computer-*

it would violate the defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized. See, *e.g.*, *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-89 & n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987), mandamus granted on other issues, 855 F.2d 1062 (3d Cir. 1988). See also *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311-321 (5th Cir. 1998) (holding that Seventh Amendment precluded use of trial plan under which liability and damages for a large group of plaintiffs were extrapolated from findings for a sample group of 160 plaintiffs, and suggesting that due process would require same conclusion).

The federal courts also have refused to paper over differences in the laws of the various states simply to make a case manageable as a multi-state class action. See, *e.g.*, *Andrews*, 95 F.3d at 1024, 1025; *Castano*, 84 F.3d at 749-750; *Georgine*, 83 F.3d at 627; *American Med. Sys.*, 75 F.3d at 1085; *Rhone-Poulenc*, 51 F.3d at 1300-1302; *Carpenter*, 1999 WL 415390, at *2-*3; *Schwartz*, 183 F.R.D. at 677-678; *Jackson Nat'l Life*, 183 F.R.D. at 223; *Chin*, 182 F.R.D. at 457-462; *Ford Motor Co. Vehicle Paint*, 182

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ized Orkeratology Soc'y, Inc., 181 F.R.D. 331, 338-339, 340 (N.D. Miss. 1998); *Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *2 (N.D. Ga. Feb. 13, 1998); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 424-425 (E.D. La. 1997); *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671, 676-680 (M.D. Ala. 1996); *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405, 410-411 (W.D. Okla. 1990); *Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240, 243 (E.D. Pa. 1983); *McHan v. Grandbouche*, 99 F.R.D. 260, 266-267 (D. Kan. 1983).

F.R.D. at 222-224; *Marascalco,* 181 F.R.D. at 337-340; *Poe,* 1998 WL 113561, at *2-*4; *Masonite Corp. Hardboard Siding,* 170 F.R.D. at 421-424; *Mack,* 169 F.R.D. at 677-679; *Zandman v. Joseph,* 102 F.R.D. 924, 929-930 (N.D. Ind. 1984); *Casper,* 560 F. Supp. at 243-244; *McHan,* 99 F.R.D. at 267; *Elster v. Alexander,* 76 F.R.D. 440, 442 (N.D. Ga. 1977).

3. Regrettably, the state courts, as a group, have been far more lax in protecting defendants — particularly out-of-state defendants — from extortionate class actions.[3] As one Member of Congress recently testified at a House hearing:

> By any objective measure, state class action suits are increasingly the weapon of choice for some in the plaintiff's bar. * * *
>
> Opportunistic lawyers have identified those states and particular judges where the class action device can be exploited. The most significant of these devices is the certification of the class itself. For many companies, it is easier and less costly to settle a class action suit once it has been certified than to fight it in a foreign jurisdiction before a potentially unfriendly judge and jury. Some state courts, however, do not give the defendants a fighting chance. They routinely certify classes before the defendant has been served with a complaint and given an opportunity to defend itself. In one case, a state court judge certified the class before the case was even filed in the court.

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[3] We are not suggesting that every state court (or even the majority) has acquiesced in class action abuse, but simply that such abuse occurs with sufficient regularity in the state court system to make it rational for Congress to have expanded federal jurisdiction over class actions.

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998), http://www.house.gov/judiciary/41155.htm (statement of Representative James P. Moran) (hereinafter "Moran Testimony").

The more sophisticated members of the plaintiffs' class action bar have managed to identify specific counties within particular states in which they can be virtually assured of finding a judge who will certify a case as a class action without regard to whether it can fairly be tried as one. As the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns. * * *
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges, many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts,* WALL ST. J., Oct. 10, 1996, at B1.

A few states have become particularly notorious for allowing extortionate class actions and running roughshod over the constitutional rights of out-of-state defendants and absent class members alike. For example, one study found that in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks

before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122544).[4] Another study found that the number of class actions filed in Texas state courts rose by 820% between 1988 and 1998. See *Class Action Litigation–A Federalist Society Survey*, 1 CLASS ACTION WATCH, at Figure 1.[5] That rate of increase is significantly higher than in the federal courts, where the number of pending class actions increased during the same ten-year period by 338%. *Ibid.*

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to casually dispense with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. For example, in 1996 a judge in Mobile County, Alabama, certified a nationwide class action alleging state law products liability, breach of warranty, negligence, and fraud claims on behalf of several million owners of homes on which the defendants' siding had been installed. In an opinion written by class counsel, the court brushed aside the constitutional choice-of-law problem, stating, without the slightest legal analysis, that "the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant individual issues." Order Certifying Plaintiff Class at 8, *Naef v. Masonite Corp.*, No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995) (reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1090 (Ala. 1996)). The court also gave short shrift to the contention that the claims were fact-specific and that the defendants were being denied the opportunity to prove defenses specific to the individual class members. *Ibid.* After the Alabama

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[4] Dr. Hendricks is the founder of an Alabama research and development company who appeared on behalf of the Chamber.

[5] A copy of this study has been lodged with the Clerk of the Court and served on the parties.

Supreme Court denied mandamus, the trial court held a "first-phase" trial limited to the issue of whether the defendants' products were defective. In that trial, the court purported to solve the dilemma of having to apply the laws of the 51 jurisdictions by simply making up its own law, amalgamating bits and pieces of the laws of the 51 jurisdictions into five different design defect standards that did not accurately represent the law of *any* State.

Meanwhile, another set of class action lawyers sought certification of an identical class in federal court. That court denied certification, holding that "[d]ifferences in state law and user facts overwhelm the common elements of plaintiffs' claims. Combined, these differences are so great as to make national class treatment unwieldy, unfair, and unlawful." *Masonite Corp. Hardboard Siding*, 170 F.R.D. at 425. The court further explained that the experience with the first phase of the Alabama case "supplies ample evidence of legal and factual variation, and thus counsels against manageability and superiority." *Id.* at 426 n.19. It deemed inadequate the Alabama court's attempt to boil down the laws of 51 jurisdictions into five sets of "Esperanto instruction[s]," opining that "[t]he number of state products liability laws that confront Masonite and their doctrinal dissonance cannot be glossed over casually." *Id.* at 422. The court concluded that "Due Process, the Seventh Amendment, * * * and Rule 23 make it impossible to accommodate the theoretical benefits of class treatment." *Id.* at 427. The defendants in *Naef* brought the Louisiana district court's ruling to the attention of the Alabama courts before what was to be the second phase of the class action trial, but the trial court refused to decertify the class, and the Alabama Supreme Court denied mandamus.[6]

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[6] For a fuller description of the constitutionally flawed procedures imposed in *Naef*, see Application for a Stay of Proceedings Pending the Filing of a Petition for a Writ of Certiorari to Review a Final

Similarly, in 1996 a federal district court in Alabama refused to certify a class action alleging that a subsidiary of General Motors fraudulently failed to disclose that it purchases installment contracts at a lower interest rate than the one charged to the car purchaser by the dealer. *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996). Reasoning that the jury would have to examine the circumstances of each transaction to resolve such issues as duty to disclose and reliance, the court dubbed the case "the antithesis of a class action." *Id.* at 677-678. Yet an Alabama trial court certified a class action raising the identical claims against a Ford subsidiary, and the Alabama Supreme Court refused to intervene. See *Ex parte Ford Motor Credit Co.*, 697 So. 2d 464 (Ala. 1997) (Hooper, C.J., dissenting).

Texas is another state in whose courts out-of-state defendants have regularly been subjected to extortionate class actions. For example, in *Texas Farmers Insurance Co. v. Sendejo*, No. 95-08-09165-CV (365th Jud. Dist. Ct.), the plaintiffs alleged that Allstate and Texas Farmers Insurance Company improperly engaged in "double-rounding" of the premiums for their auto insurance. This method of computation, *which had been required by the Texas Department of Insurance*, allegedly resulted in the overcharging of policyholders by perhaps a dollar or two per year. The suit arose when a former general counsel of the Department of Insurance with knowledge of the practice approached a Dallas lawyer well known for winning huge settlements on questionable theories of recovery. The lawyers recruited three named

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Decision of the Supreme Court of Alabama, *International Paper Co. v. Naef*, No. A-28 (filed July 3, 1997). During the pendency of the stay application, the defendants — in what could hardly be described as a surprising move in view of the forum and the amount of compensatory and punitive damages claimed by the class — settled the case and withdrew the stay application.

plaintiffs and filed a putative class action (on behalf of all Texas holders of Allstate and Farmers' policies) in rural Zavala County, a jurisdiction with very few of the putative class members but a reputation for being solicitous of plaintiffs' lawyers. See Max Boot, *Rule of Law: A Texas-Sized Class Action Fraud*, WALL ST. J., May 22, 1996, at A23. They then hired a former high school classmate of the presiding judge to act as co-counsel, and, after consistently obtaining favorable rulings from the district court, coerced the defendants into settling the dispute. The settlement agreement provided for refunds of some $5.50 per policyholder and roughly $10 million in attorneys' fees, with the bill footed, ultimately, by defendants' policyholders. As commentators uniformly declared, only the lawyers were winners. See, *e.g.*, *Auto Insurance: Class-Action Settlement Was a Travesty*, DALLAS MORNING NEWS, Dec. 26, 1996, at 28A; *Review & Outlook: Taken for a Ride*, WALL ST. J., Oct. 23, 1996, at A22.

Equally disturbing is *Ford Motor Co. v. Sheldon*, 965 S.W.2d 65 (Tex. App.–Austin), review granted Dec. 23, 1998. In *Sheldon*, the district court certified two classes of purchasers of Ford automobiles with respect to claims arising out of Ford's use of an allegedly defective paint process, and the Court of Appeals affirmed. *See id.* at 74. But in an identical suit, purportedly brought on behalf of a nationwide class of Ford owners, the United States District Court for the Eastern District of Louisiana concluded, after a searching review, that both (1) individual factual issues predominated over common issues, and (2) the proposed class action would not be superior to individual trials in the resolution of the class members' claims. See *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998). Although most, if not all, of the federal court's analysis applied with equal force to the statewide class claims in *Sheldon*, the state court nonetheless certified a class, and the court of appeals affirmed.

The Texas courts also have certified nationwide classes of plaintiffs alleging fraud in the sale of so-called vanishing premium life insurance policies, overlooking the constitutional requirement that they apply the law of the various states in which the policies were issued and paying no heed to the individualized nature of the class members' claims. See, *e.g., Security Life of Denver Ins. Co. v. Ferguson,* 1999 WL 339017 (Tex. App.–Dallas May 28, 1999); Order Certifying Class, *Klinefelter Family Revocable Living Trust v. First Life Assurance Co.,* No. C-6930-96-G (Hidalgo County Dist. Ct. Mar. 30, 1999).[7] In contrast, the federal courts routinely have held that the need to apply the laws of multiple states, individualized issues of reliance, and differences in the representations made to each policyholder make such cases impossible to try as class actions. See, *e.g., Kent v. SunAmerica Life Ins. Co.,* 2000 WL 15015 (D. Mass. Jan. 3, 2000); *Parkhill v. Minnesota Mut. Life Ins. Co.,* 188 F.R.D. 332 (D. Minn. 1999); *Velasquez v. Crown Life Ins. Co.,* 1999 U.S. Dist. LEXIS 13186 (S.D. Tex. Aug. 10, 1999); *In re: The Hartford Sales Practices Litig.,* 1999 U.S. Dist. LEXIS 10402, at *40-*51 (D. Minn. June 10, 1999); *In re Jackson Nat'l Life Ins. Premium Litig.,* 183 F.R.D. 217 (W.D. Mich. 1998); *Peoples v. American Fidelity Life Ins. Co.,* 176 F.R.D. 637 (N.D. Fla. 1998).

Similar mistreatment of out-of-state companies has occurred in North Dakota. A trial court in that state certified a class of approximately 6,000 owners of royalty interests and leasehold interests in wells from which the defendant out-of-state oil company purchased oil over a 19-year period. The plaintiffs' claim is that, when measuring the amount of oil taken from storage tanks by "hand gauging," the defendant's gaugers made adjustments to various readings that had the effect of understating the amount of oil taken. Despite the

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[7] A copy of this order has been lodged with the Clerk of the Court and served on the parties.

fact that there were thousands of different tanks involved, each with its own characteristics, that the defendant utilized numerous gaugers over the years, and that, many of the measurements were witnessed and approved by employees of the oil producers, the trial court certified a non-opt-out class action. Although concluding that two of the trial court's findings justifying a non-opt-out class action were legally erroneous, the North Dakota Supreme Court affirmed a third finding justifying non-opt-out treatment as well as the trial court's critical findings that common issues predominate over individual issues, that a class action is the most appropriate means of adjudicating the claims, and that management of the case as a class action would not pose unusual difficulties. *Ritter, Laber & Assocs. v. Koch Oil, Inc.,* 2000 N.D. LEXIS 14 (N.D. Jan. 21, 2000). Yet with individualized issues as to whether an adjustment was made at all and whether any adjustment was warranted by the condition of either the particular tank or the oil or both and with individualized defenses such as whether the producer consented to an adjustment, it is manifest that the only way this case can be tried as a class action is by depriving the defendant of its due process rights.

And, as a result of one Illinois court's willingness to certify and try a 4.7-million member, 48-state class action against State Farm under Illinois law — despite the refusals of two federal courts and one state court from northern Illinois to certify similar (indeed smaller) classes[8] — southern

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[8] See *Moorhead v. State Farm Mut. Auto. Ins. Co.,* No. 95-AR-0668-S (N.D. Ala. Sept. 12, 1997); *Murray v. State Farm Mut. Auto. Ins. Co.,* No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.,* No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998).

Illinois has recently been added to the list of favorite venues for class action lawyers.[9]

A consortium of plaintiffs' lawyers from around the country filed the class action in sparsely populated Williamson County, Illinois, on July 28, 1997, alleging that State Farm breached its contracts with its policyholders (which generally required State Farm to pay the amount necessary to restore damaged vehicles to pre-loss condition) and violated Illinois' consumer fraud statute by using the price of parts made by companies other than the automakers or their licensees ("non-OEM parts") when determining how much to pay for repairs to its policyholders' vehicles. The trial court certified the class on the same day without waiting for State Farm to be served, much less file an opposition to class certification. The court eventually held a hearing and reconfirmed its ruling, notwithstanding State Farm's argument that the need to apply the laws of the 48 states represented in the class and the individualized factual determinations that would be required made it impossible to try the case as a class action consistent with due process.[10]

The 4.7 million class members had myriad makes and models of automobiles, and over 30,000 different non-OEM parts were specified in the 4.7 million repair estimates. Undaunted, the court proceeded to conduct a trial, in which the plaintiffs were allowed to prove their claim using anecdotal testimony by owners of body shops and some

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[9] To be sure, State Farm is an Illinois company and hence would not have been able to remove the suit. Our point in discussing it is simply to illustrate the kinds of abuses that go on in some state courts and that make the expansion of federal jurisdiction over class actions perfectly rational.

[10] For a more complete description of the class certification phase of the case, see Petition for Writ of Certiorari, No. 97-2063, *State Farm Mut. Auto. Ins. Co. v. Speroni* (filed June 22, 1998).

internal State Farm memos criticizing particular non-OEM parts. They were not required to prove that each class member actually received one or more non-OEM parts (as opposed to simply having one specified on a repair estimate),[11] that the particular non-OEM parts used in each class member's repair (if any) were inferior to their OEM counterparts, or that the particular non-OEM parts installed in class members' vehicles failed to restore *any* (much less every) class member's vehicle to its pre-loss condition. Meanwhile, the trial court precluded State Farm from attempting to present individualized defenses, such as waiver and estoppel.[12] The court also prohibited State Farm from adducing testimony from current and former insurance regulators that the use of non-OEM parts was encouraged and/or permitted in their states.

Having simply been instructed to determine whether State Farm breached its "contract with the class" by using non-OEM parts, the jury found that it did. It awarded the class $456,636,180 in compensatory damages, despite the admissions of the plaintiffs' damages expert that one component of his damages calculation made no economic sense and that, in estimating the other component, he had ignored various real-world factors that could not be determined on a class-wide

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[11] State Farm adduced evidence at trial that, for a variety of reasons, class members often received OEM parts at no extra expense despite the fact that State Farm had specified a non-OEM part on the repair estimate.

[12] Many of the class members resided in states whose laws expressly require insurers to obtain the consent of the insured as a condition of using non-OEM parts. See, *e.g.*, Colo. Rev. Stat. Ann. § 42-9-107; Ind. Code § 27-4-1.5-8; N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(5)(ii); Or. Rev. Stat. §§ 746.287(1), 746.292(4)(b); R.I. Gen. Laws 1956 § 27-10.2-2; W. Va. Code § 46A-6B-3.

basis. The trial court then piled on an additional $130,000,000 in so-called "disgorgement" damages and $600,000,000 in punitive damages under the Illinois Consumer Fraud and Deceptive Business Practices Act.

Unsurprisingly, both the initial class certification and the eventual enormous judgment have been chum in the water for class action lawyers. An extraordinary number of class actions were brought in two southern Illinois counties in the months following the trial court's reaffirmation of the class certification order, many purporting to be on behalf of multi-state classes and most targeted against out-of-state defendants.[13] The October 1999 verdict produced an even more dramatic response. In the last three months of 1999, at least ten consumer class actions were filed in the same two counties, most of them against out-of-state businesses and on behalf of putative nationwide classes.[14]

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[13] See, *e.g.*, *Vollmer v. Publishers Clearing House*, No. 98-L-100B (St. Clair County, filed Feb. 3, 1998); *Longstreet v. State Farm Mut. Auto. Ins. Co.*, No. 98-MR77 (Madison County, filed Feb. 27, 1998); *Crockett v. Michigan Bulb Co.*, No. 98-L-1054 (St. Clair County, filed Dec. 11, 1998); *Crockett v. Seta Corp.*, No. 98-L-1055 (St. Clair County, filed Dec. 11, 1998); *Crockett v. Time, Inc.*, No. 98-L-1056B (St. Clair County, filed Dec. 11, 1998); *Crockett v. United States Purchasing Exch.*, No. 98-L-1057 (St. Clair County, filed Dec. 11, 1998); *Coco v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-394A (St. Clair County, filed April 28, 1999); *Turner v. Vistakon, Inc.*, No. 99-L-669 (Madison County, filed June 6, 1999); *Reichmann v. Archer Daniels Midland Co.*, No. 99-L-800 (Madison County, filed Aug. 6, 1999); *Nagel v. Archer Daniels Midland Co.*, No. 99-L-801 (Madison County, filed Aug. 6, 1999); *Littleton v. Shelter Ins. Co.*, 99-L-864 (Madison County, filed Sept. 7, 1999); *Shemwell v. The Farmers Ins. Group of Cos.*, No. 99-L-865 (Madison County, filed Sept. 11, 1999).

[14] See *Paul v. Country Mut. Ins. Co.*, No. 99-L-995 (Madison County, filed Oct. 13, 1999); *Stone v. SBU, Inc.*, No. 99-L-977 (Madison County, filed Oct. 7, 1999); *Arnold v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-0896 (St. Clair County, filed Oct. 22, 1999); *Strasen v. Allstate Ins. Co.*, No. 99-L-1040 (Madison County, filed Oct. 26, 1999); *Phillips v. Ford Motor Co.*, No. 99-L-1041 (Madison County, filed Oct. 26, 1999); *Hobbs v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-1068 (Madison County, filed Nov. 2, 1999); *Rios v. St. Paul Fire & Marine Ins. Co.*, No. 99-L-1125 (Madison County, filed Nov. 16, 1999); *Capone v General Motors Corp.*, No. 99-L-1127 (Madison County, filed Nov. 17, 1999); *Siler v. State Farm Mut. Ins. Co.*, No. 99-L-863 (Madison County, filed Nov. 30, 1999); *Winn v. Associates First Capital Corp.*, No. 99-L-1227 (Madison County, filed Dec. 23, 1999).

4. In short, out-of-state class action defendants have been subjected to procedural unfairness in state courts that would not be tolerated by the federal courts. That trend has been accelerating in recent years. As Congressman Moran put it, "[i]n essence, we have a situation where out of state defendants are being haled into the plaintiffs' state court where they face complex litigation with large sums of money at stake. These are the types of cases for which diversity jurisdiction was created." Moran Testimony, *supra*.

The compelling interest in ensuring that the engines of the American economy are not subjected to class action extortion in state courts supplies a more than rational reason for Congress to have excluded Rule 23 from the exceptions to supplemental jurisdiction set forth in 28 U.S.C. § 1367(b). Because Section 1367 unambiguously provides for supplemental jurisdiction over the claims of absent class members when the claims of the named plaintiffs satisfy the requirements of 28 U.S.C. § 1332, and because there was a manifestly rational reason for doing so, petitioners' effort to have the Court read in an exception for class actions should be rejected.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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